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MICHAEL RODAK, JR.,

No. 72-

72-1121

In the

# Supreme Court of the United States

OCTOBER TERM, 1972

JOHN H. ELLIS, *et al.*,

*Petitioners,*

*vs.*

FLYING TIGER CORPORATION,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

*No. 72-*

JOHN H. ELLIS, *et al.*,

*Petitioners,*

*vs.*

FLYING TIGER CORPORATION,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners respectfully request that a writ of certiorari be issued by this Court to the United States Court of Appeals For the Seventh Circuit to review the judgment entered in the above entitled cause.

## OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is set out in Appendix A hereto. No opinion was rendered by the District Court. The District Court's Findings of Fact and Conclusions of Law are set out in Appendix B hereto.

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 27, 1972. A timely petition for rehearing was denied by the Court of Appeals on November 15, 1972. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Where a stockholders' "corporate therapeutics" suit has undeniably resulted in a benefit to the plaintiffs' class of more than $4,000,000, should attorneys' contingent fees be fixed primarily on the basis of time spent by plaintiffs' counsel or primarily on the value of the benefit created by counsel's efforts?

2. Where fixing contingent counsel fees calls for the exercise of judicial discretion, as in the instant case, is that discretion to be the discretion of the trial judge, based on his familiarity with the development of the litigation, or that of the Court of Appeals, based on its own inferences that were inconsistent with the facts found by the trial court?

3. In fixing counsel fees, may a federal appellate court determine that the record was inadequate to permit the trial judge to make a judgment and then proceed on the basis of the same record to make a judgment of its own based on findings inconsistent with those of the trial court?

4. Does the judgment below improperly discourage "private attorneys general" actions by denying adequate fees to counsel in such a case?

## STATEMENT

The questions presented by this case are logical corollaries to those resolved recently by this Court in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970). There, this Court affirmed the right of plaintiffs to recover fees in successful "private stockholders' actions of this sort," involving, "corporate therapeutics." 396 U.S. at 396. The questions presented here essentially are how these fees are to be measured and by which court they are to be fixed.

Plaintiffs were stockholders in North American Car Corporation. On January 7, 1971, North American was merged with Flying Tiger Corporation, after an unsuccessful motion by plaintiffs for a preliminary injunction to halt the merger because of false and misleading statements in the proxy statement. By the terms of the merger, North American stockholders then received convertible preferred stock and warrants in Flying Tiger in the merger exchange for their shares in North American.

Thereafter, on March 9, 1971, Flying Tiger declared a 5% stock dividend payable on its common stock to common shareholders of record on March 26, 1971. On March 23, 1971, plaintiffs presented a motion for preliminary injunction against the stock dividend on the ground that it would unfairly dilute the recently acquired convertible preferred and warrant interests of the former North American stockholders. The trial court granted a preliminary injunction against the payment of this dividend. As a consequence of this injunction, the trading of Flying Tiger on the New York Stock Exchange was suspended. Thereafter, a settlement of plaintiffs' claims was negotiated by plaintiffs' attorneys pursuant to which all the pre-

ferred stockholders and warrant holders received full protection against any dilution of their interests through stock dividends. Those former North American stockholders who had after March 9, 1971 converted their preferred stock into common stock were given the right to rescind such conversion. The District Court found, and the Court of Appeals did not challenge this finding, that the immediately calculable benefits secured by the terms of the settlement for the plaintiff class of former North American stockholders amounted to $4,061,208. The trial court awarded plaintiffs' counsel fees of $600,000, something less than 15% of the immediate benefits conferred. The Court of Appeals reduced the attorneys' fees to $75,000, approximately 1.85% of the benefit secured for the plaintiffs' class by the settlement.

The grounds for the action of the Court of Appeals are hardly pellucid. At one point, the opinion seems to suggest that the record is deficient in affording a basis for fixing counsel fees. But if this were the case, the Court of Appeals could hardly itself have fixed the amount of the fees. At another point, the Court of Appeals seems to suggest, contrary to the findings of fact by the trial court, that the benefit to the plaintiffs' class came not from the plaintiffs' action and the resulting settlement but rather from a sudden change of heart by the corporate defendant. This dramatic corporate reversal was alleged to derive: 1) from defendant's belated recognition that the stock dividend would be taxable to non-North American stockholders if proper precautions were not taken; 2) from the suspension of trading by the New York Stock Exchange that followed the issuance of the preliminary injunction against the diluting dividend, but

the Court of Appeals illogically refused to credit this causative factor to plaintiffs' injunction action.

Ultimately, however, it is clear that the Court of Appeals for the Seventh Circuit rested its conclusion on the proposition that the fee it imposed was adequate compensation for the number of hours counsel had spent on the litigation. "This award amply compensates attorneys both for their time and their efforts to bring this litigation to a conclusion that would benefit the plaintiff class." Whatever the obfuscating language, the rule emerges from the Seventh Circuit's opinion that contingent fees are in fact to be fixed primarily by time spent and that the value or benefits conferred have little or no place in the measure of compensation in these cases.

## REASONS FOR GRANTING THE WRIT

**I. The establishment of proper standards for fixing counsel fees in appropriate cases is one of extraordinary importance to the administration of the federal judicial system.**

The issues presented here are of extraordinary importance to the administration of the federal judicial system, increasingly so as more and more litigation takes the form of class actions and suits to establish the rights of individuals and groups in the effectuation of statutory policy, cases in which compensation for successful counsel is to be fixed by the trial courts. It is clear that the fees to be fixed in successful litigation of this nature are not solely for the purpose of compensating counsel for the time expended, but also to afford incentives for lawyers to undertake representation of clients not otherwise in a position to pay for their services and as deterrents to violations of the law that would otherwise go unchallenged. (It must be remembered that many such cases accepted on contingent fees, as plaintiffs' counsel know from hard personal experience, require the expenditure of hours and hours of uncompensated time. See *e.g., Hohmann* v. *Packard Instruments Co.* (CA 7th, 1973; No. 71-1462).)

The contingent counsel fee for plaintiffs' lawyers far from being the exception in litigated cases, is rather in fact the rule. The largest single category of litigated cases in American courts are, of course, personal injury cases in which the dominant form of retainer is by way of contingent fee, usually at the standard percentage of 25% to 33⅓% of the recovery. Courts must determine the propriety of fees in a wide variety of cases,

many of which the federal courts have cognizance, such as suits under the Equal Employment Opportunities Act, *Culpepper* v. *Reynolds Metal Co.*, 442 F2d 1078 (CA 5th, 1971); *Robinson* v. *Lorillard Corp.*, 444 F2d 791 (CA 4th, 1971); school desegregation cases, *Kelly* v. *Guinn*, 456 F2d 100 (CA 9th, 1972); utility rate contests, *Lackner* v. *Illinois Bell Tel. Co.*, 111 F2d (CA 7th, 1940); *Washington Gas Light Co.* v. *Baker*, 195 F2d 29 (CA DC, 1951); Fair Labor Standards Act cases, *Michigan Window Cleaning Co.*, v. *Martino*, 173 F2d 466 CA 6th, 1949); creditors actions, *Monaghan* v. *Hill*, 140 F2d 31 CA 9th, 1944); patent royalties suits, *North Drive In Theatre Corporation* v. *Park-In Theatres Inc.*, 248 F2d 232 (CA 10th, 1957); *Refrigeration Engineering* v. *York Corp.*, 168 F2d 896 (CA 9th, 1948); class actions for welfare benefits, *Ojeda* v. *Hackney*, 452 F2d 947 (CA 5th, 1972); bankruptcy suits, *Roth* v. *Reich*, 164 F2d 305 (CA 2d, 1947); *Sampsell* v. *Monell*, 162 F2d 4 (CA 9th, 1947); will contests, *Simler* v. *Conner*, 352 F2d 138 (CA 10th, 1965); partition actions, *Tranberg* v. *Tranberg*, 456 F2d 173 (CA 3d, 1972); Indian claims cases, *United States* v. *Anglin & Stevenson*, 145 F2d 622 (CA 10th, 1944); Railway Labor Act cases, *United Transportation Union* v. *Soo Line R. Co.*, 457 F2d 285 (CA 7th, 1972); as well as, antitrust suits, *Courtesy Chevrolet* v. *Tennessee Walking Horse Assn.*, 393 F2d 75 (CA 9th, 1968); *Farmington Dowel Products Co.* v. *Forster Mfg. Co.*, 436 F2d 699 (CA 1st, 1970); and securities and stockholders suits, *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Angoff* v. *East Boston Co.*, 281 F2d 787 (CA 1st, 1960); *Angoff* v. *Goldfine*, 270 F2d 185 (CA 1st, 1959); *Green* v. *Transitron Electronic Corp.*, 326 F2d 492 (CA 1st, 1964); *Kahan* v. *Rosenstiel*, 424 F2d 161 (CA 3d, 1970); *May* v. *Midwest Refining Co.*, 121 F2d 431 (CA 1st, 1941);

*Pergament* v. *Kaiser-Frazer Corp.*, 224 F2d 80 (CA 6th, 1955); *Schechtman* v. *Wolfson*, 244 F2d 537 (CA 2d, 1957).

In this wide variety of cases, the single rule that has emerged that is applicable to all of them—a rule that was rejected by the Court of Appeals for the Seventh Circuit in the instant case—is that the fees to be awarded are to be fixed at the discretion of the trial court. Within this overall uniformity, however, subsidiary rules may be dependent on the nature and reason for the granting of attorneys' fees. For in some cases the fees are to be paid out of the purse of the losing party as an additional deterrent to law violations, as in the instances above in antitrust cases, FLSA cases, Equal Employment Opportunity cases. In other situations, the attorneys' fees are not imposed on the defendants but are rather to be derived from the benefits secured for the plaintiffs, essentially as incentives to counsel to undertake such representation as in the Indian claims cases, the securities and stockholders cases, and the ordinary personal injury cases.

In the "benefits secured" cases, as the Court of Appeals for the First Circuit, said, in *Green* v. *Transitron Electronic Corp.*, 326 F2d 492 (CA 1st, 1964):

> The fixing of the amounts of attorneys' fees must, of necessity be a matter within the discretion of the district court. The lower court "has far better means of knowing what is just and reasonable than an appellate court can have." *Trustees* v. *Greenough*, 105 U.S. 527, 537, 26 L.E. 1157 (1881). It is the lower court that has lived with the case and, therefore, is more alert to the merits of each request for counsel fees. Discretion, however, is not exercised in a vacuum, and in *Angoff* v. *Goldfine*, 270 F2d 185, 189 (1st

Cir., 1959), this court listed the factors "to be carefully considered and weighed in fixing the amounts of compensation to be awarded" by the district court:

> "• • • These factors are: the amount recovered for the corporation; the time fairly required to be spent on the case; the skill required and employed on the case with reference to the intricacy, novelty and complexity of issues; the difficulty encountered in unearthing the facts and the skill and resourcefulness of opposing counsel; the prevailing rate of compensation for those with the skill, experience and standing of the attorneys, accountants or others involved; the contingent nature of the fees, with the accompanying risk of wasting hours of work, overhead and expenses (for it is awarded only in the event of success); and the benefits accruing to the public from suits as this. • • •"

The Seventh Circuit in this case reduced these complexities to the single, simplistic standard of a proper hourly rate of compensation, in conflict not only with the First Circuit, but the other Courts of Appeals as well.

It is important, when there is more and more recognition of the fact that corporate wrongdoing of the kind involved in cases such as this cannot depend exclusively on the criminal law and other governmental action for its cure, that this Court undertake to address the problem of providing guidance to the lower federal courts. For, except for the generalities in the cases such as *Greenough*, cited in the First Circuit's opinion quoted above, this Court has failed to set out controlling standards for fixing counsel fees. The encouragement of "corporate therapeutics", suggested by this Court in *Mills* v. *Electric Auto-Lite*, 396 U.S. 375 (1970), will become empty words,

if incentive to counsel to undertake representation in such cases can be so easily undermined by decisions like the one below.

**II. The decision of the Court of Appeals for the Seventh Circuit in the instant case is in conflict with the decisions of other Courts of Appeals on important questions of law.**

**A. The decision below is in conflict with other Courts of Appeals in failing to accord due weight to the amount of benefit procured by counsel for the plaintiffs.** Perhaps there is no clearer demonstration of the departure of the Seventh Circuit from the principles to which other Courts of Appeals adhere than the fact that no other court—appellate or trial court—has restricted counsel fees in cases of this nature to 1.85% of the immediately calculable benefits secured. ("Analysis discloses a nationwide average of slightly over 20 per cent." Hornstein, *Legal Therapeutics* 69 Harv. L. Rev. 658, 665 (1956).)

Two recent decisions of the Southern District of New York, the court that does the greatest volume of this kind of litigation because its jurisdiction encompasses the major financial center of the country, make patent the utilization of amount of benefit as the primary factor in determining the amount of counsel fees to be awarded. That court said in *Derdiarian* v. *Futterman Corp.*, 254 F. Supp. 617, 620 (SDNY, 1966), and repeated in *Newmark* v. *RKO General Inc.*, 332 F. Supp. 161, 164 (SDNY, 1971), that "the amount of recovery rather than the time spent is the prime factor" in fixing the fees. In *Derdiarian*, where the benefit was $1,200,000, the fees awarded were $145,000; in *Newmark*, where the benefit secured was $7,000,000. the fees were $750,000.

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These are not idiosyncratic decisions applicable only within the Second Circuit. As already noted in the quotation from the Court of Appeals for the First Circuit, in *Green* v. *Transition Electronic Corporation,* the first factor to be considered was "the amount recovered." Only one of the many other factors, and certainly not the next in importance was the amount of time spent by counsel in securing the benefit. The Court of Appeals for the Third Circuit in stating the governing principle for measuring fees in *Kahan* v. *Rosenstiel,* 424 F2d 161, 174-75, n. 16 (CA 3d, 1970), said:

> Plaintiff's petition for counsel fees requests 10% of the $83,000,000 fund which he contends he created. The District Court is, of course, not bound to award this amount, but instead must determine the actual benefit which plaintiff created for the other Schenley shareholders. Furthermore, the sum for which plaintiff is entitled to reimbursement does not hinge solely on the benefit plaintiff is successful in recovering. *See* 396 U.S. 375 (1970), Mills v. Electric Auto-Lite Co., *supra;* Angoff v. Goldfine, 270 F2d 185, 188-189 (1st Cir. 1959) . . . The District Court should also consider the amount of time and effort expended by the plaintiff.

In *Pergament* v. *Kaiser-Frazer Corporation,* 224 F2d 80 (CA 6th, 1955), a case settled in its early stages, the court applied the standard of 20% of the recovery and debated only the question whether that rate should be applied to the sum of $450,000, as appellees contended or $500,000, as appellants contended; it chose the latter.

There can be no doubt that the other Courts of Appeals, if not the Seventh Circuit, are laboring under the apprehension that the amount of benefit conferred is the primary factor to be considered in awarding counsel fees.

It is incumbent on this Court to disabuse either the other circuits or the Seventh Circuit of the error of their ways on an issue that will recur more and more frequently in the nature of contemporary litigation.

In *Simler* v. *Conner,* 352 F2d 138, 140-41 (CA 10th, 1965), a will contest in which the court awarded 50% as attorneys' fees on a recovery of $800,000 the court said:

> In determining a reasonable attorney fee some of the factors to be given consideration are: (1) Is the fee to be a contingent one; (2) how much is involved in value in the matter; (3) what benefit has accrued to the client, (4) what degree of professional skill and experience was displayed by the attorney (5) what amount of time and expense were spent by the attorney on the matter. Also, the allowance of attorney fee is generally a matter within the sound judicial discretion of the judge and an appellate court is not warranted in overturning the trial court's judgment unless under all of the facts and circumstances it is clearly wrong.

It is obvious, therefore, that the Court of Appeals for the Seventh Circuit is marching to a different drummer than are the other circuits, not only on the question of the proper elements to take into account in fixing attorneys' fees but as to whether the function of fixing such fees belongs to the appellate court or to the trial court.

**B. The decision below is in conflict with other Courts of Appeals in rejecting the generally approved standards for contingent fees and the rule that counsel fees are matters within the discretion of the trial judge.** The Court of Appeals for the Seventh Circuit paid lip service to the rule that the trial court will be overruled on fixing attorneys' fees only for "abuse of discretion". But it quickly

discarded the notion that this rule was applicable in this case: because "there is nothing in the record to indicate what factors the trial judge deemed important in making his award, there can be no basis for adhering to the rule of discretion." The record is clear that the elements considered by the trial court judge included the amount of benefit procured; the complexity of the problem presented; the status and capacity of plaintiffs' counsel; the nature of the corporate overreaching; the contingent nature of the fees to be secured; and the amount of time expended. These are the factors that have satisfied the requirements of other circuits. The Seventh Circuit decision is in conflict with those circuits already quoted.

Assuming, however, that there was an inadequacy of findings, the decision of the Court of Appeals—to undertake to make the decision for itself rather than remand for purpose of having the trial court perform its duties according to the views of the Court of Appeals—was in conflict with the judgment of other Courts of Appeals faced with the problem that the Court of Appeals for the Seventh Circuit purported to find here. Thus, in *Angoff* v. *Goldfine,* 270 F2d 185 (CA 1st, 1959), the trial court fixed counsel fees as part of a settlement of a stockholders' derivative suit, but failed to state the basis for its conclusion. Counsel appealed from the awards on the ground that they were insufficient. The Court of Appeals for the First Circuit, while setting forth the standards to be applied, remanded the case to the district court for that court to make the application of the standards. See also *Ojeda* v. *Hackney,* 452 F2d 947, 948 (CA 5th, 1972); *Farmington Dowel Products Co.* v. *Forster Mfg. Co.,* 436 F2d 699 (CA 1st, 1970). That proper procedure was rejected here; the appellate court determined for it-

self, on the basis of its own findings of fact, on what it said was an inadequate record, what it thought to be the appropriate fee. It was radically smaller in terms of percentage of benefit than any recorded in this kind of litigation.

## CONCLUSION

The instant case presents a question of wide importance to the administration of justice in the federal courts and one which has not been addressed by this Court. The vast majority of the appeal courts hold that the matter of counsel fees is best left to the discretion of the trial judges who are familiar with the facts of the litigation and the role of counsel in bringing about a successful resolution. The decision below is inconsistent with that premise. Accordingly, this Court should address itself to this question to resolve the conflict and decide whether the vast majority of appeal court decisions are correct or whether the court of appeals below is correct.

The function of the contingent fee in cases of "corporate therapeutics", *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. at 396, is to encourage representation of plaintiffs which would not be undertaken if there were no incentive for competent and experienced counsel to do so. Certainly there will be no incentive, and the hoped for inhibitions on corporate malfeasance will not eventuate, if plaintiffs' counsel are entitled, as the Court of Appeals for the Seventh Circuit has held, to no more than standard hourly rates in the event of successful prosecution and to nothing in the event of unsuccessful prosecution.

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It is respectfully requested that this Court grant a writ of certiorari to the Court of Appeals for the Seventh Circuit to establish the appropriate rules for the award of counsel fees in the ever-burgeoning area of the law in which private litigation is expected to help effectuate national policy.

Respectfully submitted.

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## APPENDIX A

ARGUED SPETEMBER 22, 1972 — DECIDED OCTOBER 27, 1972

Before SWYGERT, *Chief Judge*, CUMMINGS, *Circuit Judge* and SPRECHER, *Circuit Judge*.

PER CURIAM. The issue presented is whether the trial court abused its discretion in awarding $600,000 in attorneys' fees in approving the settlement of a class action.

This action was begun on December 18, 1970, when the plaintiffs, common shareholders of North American Car Corporation, filed a complaint seeking to enjoin a merger between North American and the Flying Tiger Corporation on grounds that a proxy statement contained false and misleading statements. The trial judge granted plaintiffs' motion for a preliminary injunction on December 21, 1970, but reversed himself the next day. Plaintiffs' motion for emergency consideration of their appeal of the denial of the preliminary injunction was summarily denied by this court on January 6, 1971, and plaintiffs thereafter moved to dismiss the appeal. The stockholders of North American approved the merger which became effective on January 7, 1971. Notice of the proceedings in the district court was sent to former North American shareholders pursuant to order of the district court.

On March 9, 1971, Flying Tiger declared a 5% dividend on its common stock to shareholders of record on March 26, 1971. Ex-dividend trading on the New York Stock Exchange began on March 22, 1971.[1] On March 23, 1971,

[1] The rules of the New York Stock Exchange require that shares of stock trade for five market days before the effective date of the dividend without inclusion of the dividend in any sale.

plaintiffs filed a motion for a preliminary injunction preventing payment of the 5% common stock dividend. The petition, filed on behalf of all former common shareholders of North American who received preferred shares of Flying Tiger with conversion rights to common stock as a result of the merger, alleged that under the terms of the merger agreement plaintiffs were not protected by anti-dilution provisions from irreparable damage to their proportionate holdings which would follow the 5% stock dividend. The trial judge granted a preliminary injunction the same day. This injunction resulted in the suspension of trading of Flying Tiger stock on the New York Stock Exchange. The defendants filed an emergency motion with this court seeking to vacate the injunction and a hearing was set for April 1, 1971.

Counsel for each of the parties met in New York on March 28, 1971, and agreed to settle the case. The next day Flying Tiger moved to dismiss its appeal and the lower court vacated the premliminary injunction upon agreement of the parties. The settlement was approved on May 27, 1971.

Under the terms of the settlement agreement, Flying Tiger agreed to recommend that its shareholders vote to approve full dilution protection for holders of preferred stock and warrants against dividends on Flying Tiger common stock payable in common stock. The agreement also provided that any member of the plaintiff class who had converted preferred stock into common stock between March 9, 1971, and March 26, 1971, would be entitled to rescind such action. Finally, the agreement provided that Flying Tiger would pay for the costs of notice to the class and would pay "reasonable attorneys' fees."

Thereafter, attorneys for both parties filed memoranda and proposed findings regarding reasonable attorneys' fees. The district court accepted plaintiffs' proposed findings as written, merely filling in the space left blank for the amount of the award. The amount of attorneys' fees awarded was $600,000. The trial judge gave no reason for his award in this amount.

I.

The district court has wide discretion in awarding attorneys' fees, subject to the requirement that the award be fair and reasonable. *See Harris* v. *Chicago Great Western Ry. Co.*, 197 F.2d 829 (7th Cir. 1952). The reasons for this allowance of discretion are several. The trial judge is generally in the best position to assess the skill and competency of counsel in developing a factual record and legal theory, to evaluate the difficulties in preparing the case and the reasonableness of the claimed time expended by counsel, and to determine the reasonableness and propriety of settling a case upon the terms agreed to by the parties.

The discretion permitted a district court is, however, predicated on the assumption that the trial judge has carefully considered the factors described above, and that he has heard testimony and examined statements prepared by the attorneys substantiating the value of the benefits received by the plaintiff class and the hours expended by the attorneys on the case. Where, as in this case, there is nothing in the record to indicate what factors the trial judge deemed important in making his award, there can be no basis for adhering to the rule of discretion.[2]

II.

It has been generally held that an appropriate award of attorneys' fees should be determined on the basis of several elements, including the skill and reputation of counsel, the time expended by attorneys in preparing the case, the novelty and difficulty of the legal issues presented, and the benefits conferred upon the class. *Angoff* v. *Goldfine*, 270 F.2d 185, 189 (1st Cir. 1959); *State of Illinois* v. *Harper & Row Publishers, Inc.*, 55 F.R.D. 221, 224 (N.D. Ill. 1972); *In re Westec Corp.*, 313 F. Supp. 1296, 1303-1304 (S.D.Tex. 1970).

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[2] *Cf. State of Illinois* v. *Harper & Row Publishers, Inc.*, 55 F.R.D. 221 (N.D. Ill. 1972).

The district court held that the dollar value of the benefits received by the class was $4,061,208.[3] Counsel for plaintiffs argues that the amount of attorneys' fees awarded is, if the fee is included within the benefit computation, approximately 13% of the total benefit and thus well within the range of recovery permitted by other courts in similar cases.[4] Assuming this to be true, it does not answer the question of whether a percentage award is appropriate under the particular circumstances of this case.

We believe several factors indicate that a relatively large percentage award is not appropriate in this case.

In awarding attorneys' fees, it is ordinarily expected that the benefits conferred upon the class are achieved through the direct effort and skill of the attorneys involved. It is far from clear that this was so in the instant case. Subsequent to the announcement of the 5% stock dividend, the Internal Revenue Service published proposed regulations which might have had the effect of making the 5% stock dividend taxable to the Flying Tiger common shareholders unless a corresponding dilution adjustment was made in the convertibility terms

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[3] This total was computed on the following basis:

| | |
|---|---|
| Anti-dilution protection for the preferred shareholders from the 5% stock dividend declared on March 9, 1971 . . . . . | $2,673,869 |
| Anti-dilution protection for the warrant holders from the 5% dividend declared on March 9, 1971 . . . . . | $1,273,230 |
| Option to rescind for those preferred shareholders who had exercised their rights to convert to common stock from March 9, 1971, through March 26, 1971 . . . . . | $ 114,109 |

[4] The plaintiffs cite Hornstein, "Legal Therapeutics. The 'Salvage' Factor in Counsel Fee Awards," 69 Harv. L. Rev. 659 (1956), and cases discussed there as authority.

of the preferred stock and warrants.[5] Flying Tiger now states that any benefits accruing to the plaintiff class were the direct result of this change in the tax law and not from efforts of plaintiff counsel. This argument is supported to some extent by the settlement agreement. The agreement states among the reasons for deciding that settlement was advantageous for all the parties, the following:

> "WHEREAS, after the declaration by Flying Tiger on March 9, 1971 of a stock dividend, the Internal Revenue Service released proposed regulations that would subject the dividend to ordinary income tax treatment when received by Flying Tiger stockholders; and the management of Flying Tiger, on advice of counsel, has stated that it will recommend to its shareholders an amendment to the terms of the Preferred Stock and Warrants described in paragraph 1 below *primarily in order to avoid the impact of such regulations and also to serve as a basis for settlement of this action, . . .*" (emphasis added).

---

[5] Proposed Regulation § 1.305-3(d), published in vol. 36, No. 53, Federal Register, March 18, 1971, provides:

"If a corporation has convertible stock or convertible securities outstanding and distributes a stock dividend with respect to the stock into which the convertible stock or securities are convertible, no increase in proportionate interest in the assets or earnings and profits of the corporation by reason of such stock dividend shall be considered as having occurred provided—

(1) An adjustment in the conversion ratio to reflect such stock dividend is made . . . , and

(2) The distributing corporation attaches to its income tax return for the taxable year of the distribution (i) a statement that the corporation elects to make an adjustment in accordance with the provisions of subparagraph (1) of this paragraph, nd (ii) a copy of the corporate authority for such an adjustment procedure."

It further appears, both from the settlement agreement and statements of plaintiffs' counsel at oral argument on the issue of attorneys' fees, that plaintiffs may have had a strong motive for reaching an agreement to settle the case, regardless of any benefits which might fortuitously be conferred upon the class they represented, at the time the parties agreed to meet in New York. As previously stated, The effect of the trial judge's granting of plaintiffs' request for a preliminary injunction against the issuance of the stock dividend was a suspension in all trading of Flying Tiger stock on the New York Stock Exchange. A prolonged suspension of trading would have had a detrimental and perhaps disastrous economic effect on all Flying Tiger shareholders, including the plaintiff class. Counsel for plaintiffs stated during argument below:

> "At that time . . . we became quite concerned because on the following day, Wednesday, the New York Stock Exchange stopped trading in the securities of Tiger, which was listed on the New York Stock Exchange. We started calling the New York Stock Exchange and representatives of the company in an effort to work out an interim agreement among us, prior to the Court of Appeals ruling, which would permit the shares to be traded." (App. 305).
>
> "My main purpose in going there [to New York] was to obtain the resumption of trading." (App. 306).

The settlement agreement also indicates that a primary purpose in deciding to settle was the potential disastrous effect of the suspension of trading on the New York Exchange.[6]

---

[6] The agreement states:

"WHEREAS, plaintiffs through their attorneys obtained an agreement in principle to settle this matter on reasonable terms and *were acutely concerned about the suspension of trading privileges* of the Flying Tiger securities on the New York Stock Exchange and the

A further consideration in awarding a substantial percentage of the shareholder benefits to counsel has been the amount of effort expended in preparing the case. Successful counsel in many cases have achieved the class benefits only after extensive discovery, successive appeals and development of new legal theories or implementation of older theories to apply to a new set of facts. In this case there does not appear to have been any discovery or even any preparation for trial on the merits of the case. The record does not indicate that any new developments in the law have resulted from this litigation; both appeals, resulting from the granting or denial of preliminary injunctions, were dismissed pursuant to motions by the parties.

In their petition for an award of attorneys' fees, plaintiff's counsel stated that the number of hours spent in preparation of the case totaled 570.[7] The district court made no finding that this was a reasonable expenditure of time considering the skill and competency of the average attorney; however, we will assume for purposes of this appeal that the number of hours claimed was reasonable. If the $600,000 award were to stand, the attorneys would therefore be paid approximately $1,000 an hour for their time. Although the amount of time expended in preparation of a case is ordinarily only one factor to be considered by a district court, we think that the circumstances presented here necessitate a decision based somewhat more closely on the number of hours actually spent in preparation than would be the case where substantial benefits had been achieved following protracted or particularly innovative litigation.

---

[6] (Continued)

American Stock Exchange and the possible adverse effects of this suspension on the value of these securities . . ." (emphasis added).

[7] Plaintiffs' total of 797 hours included 227 hours spent in preparing and litigating the issue of attorneys' fees in the court below.

In conclusion, based on a study of the course of this litigation, the difficulties and preparation time involved, and the benefits achieved for the class, we think an award of $75,000 is appropriate and entirely adequate.[8] This award amply compensates the attorneys both for their time and their efforts to bring this litigation to a conclusion that would benefit the plaintiff class. The award will be reduced accordingly.

REVERSED.

[8] The parties agreed that the proper amount of costs and disbursements was $2,642.73. This amount is not included in the $75,000 award.

## APPENDIX B

### FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATIVE TO FEE AND DISBURSEMENTS AWARD

The Court, having considered the sworn petition and reply of plaintiffs' counsel ("petitioners"), and the answer of defendant, The Flying Tiger Corporation, having presided over this cause from its inception and considering the record herein as a whole, and having considered the briefs and arguments of counsel, now makes the following Findings of Fact and Conclusions of Law.

### FINDINGS OF FACT

#### Basis of Action Requested

1. On April 2, 1971, a Stipulation of Settlement signed by counsel for all parties to settle and dispose of this class action was filed.

2. The Court by its Final Order and Judgment Approving Settlement and Disposing of Class Action entered its final judgment effecting the settlement contemplated thereby.

3. Paragraph 6 of said final order of May 27, 1971, retains and reserves jurisdiction for the purpose of effectuation of the settlement; paragraph 7 thereof directed the filing of a petition for the award of attorneys' fees and disbursements of the plaintiffs to be paid by defendant, The Flying Tiger Corporation, pursuant to subparagraph 6 (d) of such Stipulation of Settlement.

#### Summary of Proceedings

4. This lawsuit was filed as a class action on December 17, 1970; it was heard the next day on an application for preliminary injunction, which hearing was continued

and concluded on December 21, 1970, immediately prior to the stockholders meeting of North American Car Corporation called to vote upon the proposed merger. The Court, prior to the stockholders' meeting, announced its decision that the proxy material was insufficient and permitting the meeting to be held for the sole purpose of tabulating the vote.

5. On the following day, after verbal representations from Mr. Wayne Hoffman, Chairman of the Board of The Flying Tiger Corporation appearing as one of its attorneys, the Court permitted the merger to become effective subject to a protective order entered on December 23, 1970. The effective date of the merger was stayed only until January 7, 1971.

6. Plaintiffs immediately perfected an appeal. The Court of Appeals on January 6, 1971 denied emergency injunctive relief, and plaintiffs thereafter dismissed such appeal. Certain defendants, including The Flying Tiger Corporation, docketed appeals from the same order, within 30 days after December 23, 1970, but ultimately dismissed such appeals in the Court of Appeals.

7. After defendants answered the complaint (either at or after the application for preliminary injunction).

8. After further considerable proceedings and argument in Court, the terms of a notice (which The Flying Tiger Corporation had agreed to send under the order of December 23, 1970), to former North American Car shareholders were settled by order of Court. Thereafter, plaintiffs, by motion, called to the attention of the Court certain deficiencies in the form and manner of such notice as actually sent, and the Court ordered further corrective performance of the notice requirements.

9. Thereafter The Flying Tiger Corporation declared, on March 9, 1971, a 5% stock dividend on its common stock. Under the terms of the merger agreement plaintiffs were not protected by anti-dilution provisions from this 5% stock dividend. The plaintiff's challenged this act by

applying for another preliminary injunction. After court hearing this injunction was granted on March 23, 1971.

10. The Flying Tiger Corporation appealed immediately and requested an order of the Court of Appeals for expedited hearing. The common stock of The Flying Tiger Corporation was suspended from trading by The New York Stock Exchange apparently because ex-dividend trading had been allowed to begin before the injunction was issued. This resulted in a further trading suspension of the preferred shares and warrants. Expedited appeal hearing was granted and oral argument was set for April 1, 1971.

11. While such appeal was pending, at the request of the defendant, The Flying Tiger Corporation, one of the attorneys for plaintiffs met in New York City on Sunday, March 28, 1971 with the attorneys for The Flying Tiger Corporation. At the conclusion of such meeting the attorneys agreed to recommend to the Court that the matter be settled as set out more fully below.

12. On Monday, March 29, 1971, The Flying Tiger Corporation and the plaintiffs dismissed the expedited appeal, restoring jurisdiction to this Court. The preliminary injunction was then vacated by this Court upon the agreement of the parties. The exchanges resumed trading in the securities.

13. On Friday, April 2, 1971, the settlement terms were reduced to the written Stipulation of Settlement and filed for consideration by this Court. Orders were entered determining the class represented and providing for class notices of the action and of the settlement.

14. On May 27, 1971, after notice, and there being no objections, the settlement was approved on that date and final judgment entered.

Benefits Conferred on Class by Settlement

15. The settlement conferred certain benefits on the class. In general, The Flying Tiger Corporation was to

amend the charter provisions and eliminate those clauses which deprived its preferred and warrants of anti-dilution protection from the 5% common stock dividend which *had been* declared in 1971 and another such dividend which *could be* declared in 1972. Further, it was to extend rescission rights to those preferred holders who had converted to common in response to the dividend as originally declared, without dilution protection. Also, The Flying Tiger Corporation was to bear the printing and mailing costs of notice of the class action and the settlement. Finally, The Flying Tiger Corporation was to pay the attorneys for the plaintiff class (instead of having such payment carved out of the recovery) in a sum to be decided by this Court. This produces, mainly, the following benefits for the class:

A. Anti-dilution protection for the preferred shareholders from the 5% stock dividend declared on March 9, 1971.

B. Anti-dilution protection for the warrant holders from the 5% stock dividend declared on March 9, 1971.

C. Option to rescind for those preferred shareholders who had exercised their rights to convert to common stock from March 9, 1971 through March 26, 1971.

D. Anti-dilution protection for possible second year 5% stock dividend for preferred shareholders.

E. Anti-dilution protection for possible second year 5% stock dividend for warrant holders.

F. Payment of attorney fees by The Flying Tiger Corporation in addition to the above conferred benefits, rather than subtracting such fees from the conferred benefits before distributing the balance to the class.

16. The Court finds that for purposes of evaluating the settlement benefits to the class it is appropriate to use a dollar value for common stock of The Flying Tiger Cor-

poration. While the stock is subject to fluctuation and has recently traded substantially above and below the figure used, the Court finds that the closing price thereof on May 27, 1971 (the day the settlement was approved), is the reasonable valuation for such purposes. Such price was $43 per share.

17. The approximate benefits for the class under paragraph 15-A would be computed by multiplying 62,183 additional common shares to be issued upon conversion of the preferred shares by the price of the common shares ($43) making a total benefit of approximately ....$2,673,869.

18. The approximate benefits for the class under paragraph 15-B would be computed by multiplying 29,610 additional common shares to be issued upon exercise of the warrants by the price of the common shares, making a total benefit of approximately .....$1,273,230.

19. The approximate benefits made available for the class under paragraph 15-C would be computed by multiplying the dividends that would be received by those preferred shareholders, prior to the conversion, by the total amount of shares which were converted between March 9, 1971 and March 26, 1971. Assuming a forced conversion at the first opportunity by the issuer, this would be computed by multiplying $.90 by 126,788 shares of preferred stock subject to rescission .....$114,109.

20. The potential benefits for the class under paragraph 15-D, anti-dilution adjustment to the preferred stock for future stock dividends before January 7, 1973, are substantial. However they involve the contingencies that the preferred stock may be the subject of a forced conversion or be called before such a dividend and that such a dividend may possibly not be declared. No dollar value can presently be assigned to this benefit.

21. The potential benefits for the class under paragraph 15-E, anti-dilution adjustment to the warrants for future stock dividends before January 7, 1973, are substantial. However they involve the contingency that such

a dividend may possibly not be declared. No dollar value can presently be assigned to this benefit.

22. The benefits to the class by having The Flying Tiger Corporation pay their attorney fees rather than having the fees deducted from the total benefits are substantial and depend upon the amount of fees allowed.

23. The findings set out in paragraphs 17 through 19 above are approximations and not exact formulations; they are sufficient for their purpose, namely, considering them with other relevant factors in fixing a fair and reasonable fee to be paid by The Flying Tiger Corporation.

24. The benefits of the settlement for the class were obtained as the direct and proximate result of the work and efforts of the petitioners in this case.

Legal Services Rendered for the Class

25. Petitioners performed all the necessary legal services including consulting with certain of the plaintiffs prior to filing the complaint, investigating the facts, developing the necessary legal theory to justify relief to the plaintiffs, legal research, filing complaint and motion for preliminary injunction and then continuing to press for a successful conclusion for the class, as set forth more fully in paragraphs 4 through 14 above.

26. Petitioners have expended about 797 hours involving many courtroom hours to and including the hearing of this petition. Also, the attorneys have worked on many nights and week-ends because of the emergency nature of much of the work.

27. Full recovery of the fair and reasonable compensation to which petitioners would be entitled was contingent upon a successful conclusion of this case resulting in substantial benefits to the class. A sum of $20,000 was deposited by the actual plaintiffs on the understanding that they would be billed for time only and that such billing would be terminated at the figure of $50,000 regardless

of further time and effort actually required. The entire amount so advanced (actually $20,000) is subject to refund to the plaintiffs out of fees, if any, recovered by settlement or trial. The amount of $50,000, which was the limit of plaintiff's commitment, would have been grossly inadequate in the event the matter was litigated to a conclusion.

28. Petitioners are senior attorneys practicing security and corporate law and were opposed in their efforts by skilled attorneys from the finest firms in Chicago and one of the major law firms in the United States. Petitioners discharged their obligations to the class by pressing all of the claims set forth in the complaint, bringing to the attention of the Court matters necessary to protect the class' interest during the pendency of the litigation, and eventually recommending to the Court a settlement agreement which under the circumstances was in the best interest of the class represented by the petitioners.

29. Due to the efforts of the petitioners, the class derived great benefits, as fully set forth above in paragraphs 15 through 24.

30. Due consideration should be, and has been, given to all relevant factors, including:

a. The uncertainty of obtaining a fee commensurate with the undertaking made and the work involved, unless the case were successfully concluded, thereby making recovery of such a fee substantially contingent on a successful conclusion of the case.

b. The need to encourage attorneys to undertake representative actions and motivate the "corporate therapeutic" effect of representative actions with substantial incentive when there is sufficient recovery by trial or settlement.

c. The established skills and qualifications of counsel.

d. The initiative and resourcefulness of counsel in developing the cause of action for the class.

e. The amount or value of the recovery for the class including in this case a substantial increase in its proportionate interest in the enterprise resulting from the merger.

f. The time spent.

Appropriate Amount

31. The Court finds that under all of the circumstances a reasonable and fair fee to the petitioners is the sum of $600,000.00. In determining the amount of said fee, the court has considered those potential benefits (found in paragraphs 20 and 21 above) when and if a further common stock dividend is declared of record date before January 7, 1973, even though such benefits are not ascertainable in an exact amount at this time.

32. The parties are agreed that the proper amount of costs and disbursements to be awarded is .....$2,642.73

33. If a dividend on the common stock of The Flying Tiger Corporation payable in such common stock is declared of record date on or before January 6, 1973, then petitioners would be entitled to an additional fee depending upon the value of such benefit as ascertainable at that time and all other relevant considerations at that time. Jurisdiction should be reserved to consider and determine the amount of an appropriate additional fee in that event.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the persons of petitioners (plaintiffs' counsel) and The Flying Tiger Corporation, and has jurisdiction of the subject matter of the Petition of Plaintiffs' Attorneys for Fees and Disbursements.

2. Plaintiffs are entitled to an award of .....$2,642.73 in full and complete discharge of costs and disbursements, said sum to be paid by The Flying Tiger Corporation to petitioners (plaintiff's counsel) which payment shall relieve The Flying Tiger Corporation of any and all responsibility for the proper application, distribution or crediting thereof.

3. Petitioners are entitled to an award of $600,000.00, as attorneys fees from The Flying Tiger Corporation and to the immediate entry of judgment for the petitioners against The Flying Tiger Corporation in said amount.

Dated: July 27, 1971.

.....
J. Sam Perry
U. S. District Judge

## APPENDIX C

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

November 15, 1972.

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*

Hon. WALTER J. CUMMINGS, *Circuit Judge*

Hon. ROBERT A. SPRECHER, *Circuit Judge*

JOHN H. ELLIS, et al.,
*Plaintiffs-Appellees,*

No. 71-1704 vs.

THE FLYING TIGER CORPORATION,
*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
(70 C 3161)

On consideration of the petition for rehearing filed in the above-entitled cause,

It Is Ordered that the same be and it is hereby denied.

FILE COPY

FILED
MAR 12 1973
MICHAEL RODAK, JR., CLERK

NO. 72-1121

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

**JOHN H. ELLIS, et al.,**
**Petitioners,**

**v.**

**THE FLYING TIGER CORPORATION,**
**Respondent.**

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF IN OPPOSITION

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**Respondent.**

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF IN OPPOSITION

**Question Presented:**

The only issue here is whether the Court of Appeals was correct in determining that the District Court had grossly abused its discretion in awarding plaintiffs' attorneys* a

* While the case still bears the original title under which it was filed in the District Court, the true petitioners in interest are Howard Arvey, Esq. and John J. Enright, Esq., attorneys, and their law firm, Arvey, Hodes & Mantynband, the petitioners (hereinafter referred to as "plaintiffs' counsel") and one of the original defendants, The Flying Tiger Corporation (hereinafter referred to as "Flying Tiger"). All other parties were dismissed pursuant to the settlement agreement which ended the action except as to a "reasonable fee" for plaintiffs' counsel. The petition for a writ of certiorari and the opinion of the Court of Appeals printed as an Appendix thereto are cited "Pet. ....." and "Op. .....", respectively; the appendix in the Court of Appeals is cited "App. .....".

fee of $600,000 (over $1,000 per hour), in addition to $50,000 agreed to be paid by their clients, in a case in which no corporate wrong was redressed, no discovery was had and the parties entered into a settlement agreement which did not require payment of money and which agreement was primarily made because of (a) the occurrence of an intervening tax ruling making the dividend taxable to the recipient, and (b) havoc created by an ill advised temporary injunction obtained by plaintiffs' counsel against the payment of a stock dividend.

**Counter Statement of the Case:**

Contrary to petitioners' statement (Pet. 3), this case bears no relationship whatever to *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970), nor to any other case involving "corporate therapeutics". The interlocutory injunction which resulted in the $600,000 fee award corrected no corporate wrongdoing. The injunction was directed against the issuance of a 5% stock dividend pursuant to the terms of a convertible preferred stock, which terms had been fully described in a proxy statement and approved by stockholders. The dividend enjoined was not part of the merger to which plaintiffs' complaint was addressed. Neither the gravaman of the complaint nor the papers seeking the injunction alleged that the stockholders' consent was not properly obtained or that the terms of the dividend were not properly described in the proxy statement. The case was settled before discovery commenced. The settlement agreement providing for the payment of a "reasonable" fee was reached not because of any wrongdoing by Flying Tiger, but to prevent a tax inequity occasioned by a proposed I.R.S. regulation (§ 1.305-3(d), 36 Federal Register No. 53) promulgated March 18, 1971 after the declaration of the dividend and to remedy the calamitous situation created by the temporary injunction obtained by plaintiffs'

counsel which resulted in suspension of trading on both the New York and American Stock Exchanges of all Flying Tiger stock with disastrous results to its stockholders, including the class represented by plaintiffs' counsel.

In early August 1970, Flying Tiger made a tender offer for North American Car Corporation (hereinafter referred to as "North American") which was originally opposed by a lawsuit brought by North American's management (App. 22-24). In the latter part of August, the opposition was terminated and litigation dismissed with the consent of North American's management (App. 54, 59).

On November 23, 1970, a joint proxy statement which had been reviewed by the SEC before mailing, and all the Commission's comments included, was sent to North American and Flying Tiger stockholders for the purpose of voting on the adoption of a plan and agreement of merger (App. 43, 56). Each stockholder of North American was to receive in a taxable exchange one share of new $1.20 Series Cumulative Convertible Preferred Stock of Flying Tiger and ⅓ of a warrant to purchase, on or after the middle of 1971, one share of Flying Tiger common stock, at a price of $31 per share, until the end of 1975. Each share of $1.20 Series Cumulative Preferred Stock was to be convertible into seven-tenths (7/10ths) of one share of the common stock of Flying Tiger (App. 50, 55, 162). Protection from dilution of the conversion privilege of the Preferred Stock and warrants was provided, except that the proxy statement made clear that there would be no adjustment of the conversion privilege in the event of annual 5% common stock dividends by Flying Tiger for two years (App. 55, 162). The payment of one of these dividends was the object of the injunction leading to the settlement for which the $600,000 was awarded.

On Friday, December 18, 1970, one full month after the merger proxy statement was mailed, and just a weekend away from the date set for the meeting, December 21, 1970, plaintiffs' counsel commenced this action with a motion to enjoin the proposed merger (App. 13-41). Plaintiffs' primary ground for seeking an injunction was a claim of an allegedly improper and undisclosed "deal" between North American management and Flying Tiger to settle the prior litigation (App. 25-26). It later appeared that plaintiffs' counsel had been retained by a few substantial North American shareholders whose principal objection to the merger was that it was not tax free (App. 13-14, 68). It also later appeared that the shareholders had agreed to pay plaintiffs' counsel up to $50,000 in counsel fees to attack the merger because it constituted a taxable event to them. General Lasher, Chairman of the Board of North American, was the principal witness at brief evidentiary hearings of a few hours on Friday, December 18, and on Monday December 21, 1970 (App. 59-65). The trial court specifically stated that General Lasher's "conduct has been admirable" and with respect to him and the other directors, said:

> "These men used good judgment. The General fought a good fight, he and his men, and very wisely retreated at the proper time. They did all they could do to save what they could and get the best deal that they could out of that for the stockholders. I think he acted in good faith and these men that remained there acted the best they could under all of the circumstances." (App. 59).

Thus, *contra* to the complaint there is a specific finding that the management of North American was not promised any benefits or inducements in order for Flying Tiger to secure control of North American (App. 59). Nevertheless, Judge Perry announced from the bench that he would grant

a preliminary injunction prohibiting the merger but permitting the voting to proceed which was scheduled for 2:00 p.m. on that day (App. 62, 65).

On Tuesday, December 22, after a further hearing of one hour, largely consumed by the statement of Wayne M. Hoffman, Chairman and Chief Executive Officer of Flying Tiger, the trial court abruptly changed its mind and entered an order dissolving the preliminary injunction and permitting the merger to become effective on January 7, 1971 (App. 65-81, 123). The order further provided that North American's business should be held separate so as to permit divestment if the litigation were determined adversely to defendants (App. 122-24). The stockholders of North American overwhelmingly approved the merger and it was consummated on January 7, 1971 (App. 341).

On March 9, 1971, Flying Tiger, as it had stated it might do in the prior proxy statement, declared a 5% dividend on its common stock payable to shareholders of record on March 26, 1971 (App. 161). Under the rules of the New York Stock Exchange, this meant that the Flying Tiger common stock commenced trading "ex-dividend" on March 22, 1971.*

On Monday, March 22, 1971, after ex-dividend trading had commenced, counsel for defendant Flying Tiger first received notice from plaintiffs' counsel that on the following day in the lawsuit challenging the merger, they would seek a preliminary injunction preventing payment of the 5% stock dividend which had not previously been challenged by way of pleadings or argument (App. 167).

On March 23, 1971, brief hearings were held on this motion. In spite of defendants' attorneys' statements as to

---

* Rules of the New York Stock Exchange provide that shares of stock trade for five market days before the effective date of the dividend, without including that dividend in those sales.

the importance of the motion to all the stockholders, the drastic effects on the market which would follow from the entry of an injunction, and in spite of the offer to present testimony, a preliminary injunction was granted from the bench by Judge Perry enjoining the issuance of the 5% stock dividend, although the stock then had been trading "ex-dividend" for two days (App. 170, 172, 175, 181-82). On the same afternoon, defendants filed an emergency motion with the Court of Appeals seeking to dissolve the preliminary injunction (App. 7). The emergency nature was recognized and a hearing on expedited briefs was set for April 1, 1971 (App. 250). On March 24, 1971, trading of Flying Tiger stock and warrants was halted by the New York and American Stock Exchanges because of the uncertainty as to the value of all Flying Tiger securities created by the injunction (App. 191, 249).

As a result of the havoc created by the injunction, attorneys for the plaintiffs and defendants met in New York on Sunday, March 28, 1971, with New York counsel for Flying Tiger, for the purpose of eliminating this chaos and securing the resumption of trading (App. 305-07). Discussion of the market problem was expanded to include possible settlement of the litigation. It was pointed out that an unforeseeable intervening development in the tax law occurring *after* the declaration of the dividend by Flying Tiger indicated the 5% stock dividend might be taxable to the Flying Tiger common stockholders unless a corresponding dilution adjustment was made in the convertibility terms of the preferred stock and warrants (App. 307, 317).

As stated by the Court of Appeals in its opinion, the settlement was effected by Flying Tiger that Sunday in New York, not because of the efforts or skill of plaintiffs' counsel but "primarily in order to avoid the impact of such [tax] regulations" (Op. 5a).

The Court of Appeals also correctly pointed out that plaintiffs' counsel had reasons other than benefit to the class which motivated both them and Flying Tiger to settle —viz., "a detrimental and perhaps disastrous economic effect on all Flying Tiger shareholders, including the plaintiff class"* of the injunction so rashly obtained by plaintiffs' counsel which necessitated the suspension of trading (Op. 6a).

On Monday, March 29, 1971, Flying Tiger's emergency appeal was dismissed by agreement in the Court of Appeals and later the same day, upon joint motion, the trial court dissolved the minute order of March 23, 1971, by which the payment of the stock dividend had been enjoined; trading in Flying Tiger securities resumed the next day (App. 342).

A joint stipulation of settlement was submitted to the trial court providing for the submission to Flying Tiger stockholders of an amendment to the terms of the preferred stock and warrants so as to provide dilution protection for such stock and warrants in the event of any stock dividend on the Flying Tiger common stock (App. 191-92). Following approval of the change in the terms of the security by Flying Tiger shareholders and notice to the class, the trial court entered a final judgment approving the settlement and disposing of the class action (App. 201-04).

The final agreed upon order dismissed the complaint as against all defendants, with prejudice, on the merits (App. 202) and provided for payment of "reasonable" attorneys' fees and disbursements to plaintiffs' counsel to be paid by Flying Tiger (App. 203). Plaintiffs' counsel filed a petition

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* The opinion notes that plaintiffs' counsel conceded at oral argument in the trial court that his primary purpose in going to New York was "to obtain the resumption of trading" and that the settlement agreement states plaintiffs' concern about the "suspension of trading privileges." (Op. 6a)

for fees and disbursements, along with a memorandum of authorities and appendix of fee information (App. 204-47). In their reply to defendants' memorandum, plaintiffs' counsel alleged that they devoted a total of 797.10 hours to the matter, but 226.8 hours were admitted to have been devoted solely to the petition for fees by them (App. 299). No specified amount for the fee was requested in the petition (App. 212, 336).

Plaintiffs' counsel had a fee arrangement with the named plaintiffs whereby they were paid $20,000 to institute the case and were to be compensated for time expended up to a total of $50,000, after which the fee would be negotiated (App. 211). While this agreement was alleged by plaintiffs' counsel to be a contingent arrangement, firm and in writing (App. 272), it was never made a part of the record in either court below.

During a two-hour hearing on the issue of attorneys' fees, the trial court heard oral argument from both sides (App. 303-19). No testimony or other evidence was submitted by plaintiffs' counsel. Attorneys for the defendant filed materials with the court from the case of *Morgan* v. *Meyercord*, 70 C 2262 (N.D. Ill. 1971) dealing with appropriate standards and rates with respect to court awards of attorneys' fees in matters of this type in the Northern District of Illinois (App. 320-23).

The trial court requested both parties to submit findings of fact and conclusions of law (App. 328). Defendants' proposed findings utilized the rates established in *Morgan, supra*, which would result in a fee of $51,510 (App. 326). Plaintiffs' counsel's proposed findings were adopted *in toto* by the court except for a minor omission (Compare App. 329-38, 339-48). The $600,000 largesse was inserted by the court in the blank left in the order submitted by plaintiffs' counsel (App. 338).

Flying Tiger's appeal from the awarded fees resulted in a Court of Appeals decision reducing these fees. Rehearing was denied. The petition for certiorari followed.

## I.

## PRINCIPLES OF "CORPORATE THERAPEUTICS" ARE INAPPLICABLE IN THE INSTANT CASE

Understandably loathe to admit that they seek certiorari in this case because of economic considerations personal to counsel, petitioners have distorted the factual and legal issues in an effort to find a more acceptable rationale for the restoration of the fee award which averaged over $1,000 per hour.

There is no basis for the wildly unfounded assertion made in plaintiffs' counsel's statement that *"corporate wrongdoing of the kind involved in cases such as this* cannot depend exclusively on the criminal law and other governmental action for its cure" (Pet. 9, emphasis added). There was no corporate wrong-doing. This gratuitous statement, devoid of concrete support in the record, is uncalled for and offensive.

The claim put forward by plaintiffs in their lawsuit attempting to block the merger was that there had been an improper and undisclosed arrangement between North American management and Flying Tiger. This claim was specifically rejected by the trial court, which after several hearings permitted the merger to proceed.

The preliminary injunction, which can be the only basis for awarding the fee, related to the dilutive aspect of a dividend which was not part of the challenged merger, but was declared eight weeks after the merger had been accomplished. The ultimate settlement agreement providing for reasonable attorneys' fees was precipitated by suspension

of trading resulting from an injunction improvidently granted against payment of a 5% stock dividend. The settlement had nothing to do with the merger or corporate wrongdoing. The settlement agreement expressly stated that such antidilution protection as thereunder afforded was extended primarily to avoid the adverse impact of recently announced tax regulations. It contained no concession of liability. In the entire record there is no evidence suggesting even so much as technical culpability on the part of Flying Tiger, much less an adjudication or concession of deliberate wrongdoing. To analogize those facts to instances in which large fees have been justified for remedying corporate wrongs and in which there have been imposition of penal sanctions is to depart entirely from reality.

It is similarly deceptive to cloak with unwarranted significance, in this attempt to swell attorneys fees, general language dealing with "corporate therapeutics" found in *Mills* v. *Electric Auto-Lite Company*, 396 U.S. 375 (1970).* In that case policies of corporate suffrage as protected by Section 14 (a) of the Securities Exchange Act of 1934 were at issue. No such policies are involved in this case. Unlike *Mills*, there has been and could be no finding of intentional or inadvertent liability under the securities laws, no incremental benefit to the corporation as a whole, and no vindication of statutory policies to justify an imposition of counsel fees upon Flying Tiger.

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* *Mills* itself makes no reference to the quantum of fees to be awarded but is concerned solely with *whether* such an award is appropriate.

## II.

## PLAINTIFFS' COUNSEL'S FEE ARRANGEMENT WAS NOT CONTINGENT

Petitioners characterize their fee arrangement as contingent (Pet. 2). While the petition explores in substantial detail the frequency and diversity of recognized contingent fee arrangements, no attempt is made to provide insight as to what was the actual understanding between plaintiffs and their counsel.

Plaintiffs' counsel's own statements established that the hazard as to uncompensated time was greatly minimized when compared to what is customarily denominated a contingent fee. Plaintiffs' counsel has admitted that its clients had agreed to advance $20,000 on filing of the lawsuit to be applied against charges to be made for time to be expended. An additional advance of $30,000 was agreed to for further time charges, which thus obligated plaintiffs' counsel's clients for fees of $50,000 if the time expended reached that figure (App. 211, 272).* Applying rates found proper for skilled and experienced securities lawyers in the recent case of *Morgan* v. *Meyercord*, *supra*, results in a total fee for all time expended in this case by plaintiffs' counsel, including that devoted to their petition for fees, of just in excess of the $50,000 agreed upon, so that adequate compensation for their total effort here was provided by their client without any need for "incentive awards". Under this alleged arrangement, success was not a condition precedent to substantial compensation.

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* Unfortunately, if there are any other relevant aspects of this agreement, they are not known to Flying Tiger, since plaintiffs' counsel chose not to make their written fee agreement a part of the record.

## III.

## AN AWARD OF ATTORNEYS FEES OF $600,000 IN THE CIRCUMSTANCES OF THIS ABBREVIATED ACTION WAS AN ABUSE OF JUDICIAL DISCRETION PROPERLY CORRECTABLE BY THE APPELLATE COURT

Precedent from this Court firmly establishes that a reviewing tribunal pursuant to Rule 52(a) of the Federal Rules of Civil Procedure may set aside the findings of fact of a trial court made without a jury if found on the record to be clearly erroneous *United States* v. *Gypsum Co.*, 333 U.S. 364, 394-95 (1947). The burden of this standard is greatly relaxed, if not entirely dispensed with, where, as here, such findings are inferences drawn from documentary evidence or undisputed facts and thus in no way dependent upon candor or credibility of witnesses *United States* v. *United Steelworkers of America*, 271 F.2d 676 (3rd Cir. 1959), *aff'd.* 361 U.S. 39 (1959). Moreover, such persuasiveness as might be accorded to the findings adopted by the trial court is substantially diminished since "these detailed findings were 'mechanically adopted' to use the phrase of the late Judge Frank in *United States* v. *Forness*, 125 F.2d 928, 942, and do not reveal the discerning line for decision of the basic issue in the case." *United States* v. *El Paso Gas Co.*, 376 U.S. 651, 657 (1964). See: *Holbrook* v. *Institutional Insurance Company of America*, 369 F.2d 236, 242 (7th Cir. 1966); *Rosenblatt* v. *Northwest Airlines, Inc.*, 435 F.2d 1121, 1124 n.1 (2nd Cir. 1970); *In Re Flora Mir Candy Corp.*, 432 F.2d 1060, 1062 n.2 (2nd Cir. 1970); *Roberts* v. *Ross*, 344 F.2d 747, 752 (3rd Cir. 1965).

Finally, the appellate court acted fully in accord with accepted practice in cases of this type in reducing without remand the fee award found excessive *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952); *Harris* v. *Chicago Great West-*

*ern Ry. Co.*, 197 F.2d 829 (7th Cir. 1952). There existed neither logical nor legal basis for remand. The ultimate finding of reasonableness "is a conclusion of law or a determination of a mixed question of law and fact, [where] we may substitute our judgment for that of the trial court . . . we may ignore the trial judge's finding and substitute our own." *Fritz* v. *Jarecki*, 189 F.2d 445, 448 (7th Cir. 1951). Accord, *Merchants National Bank & Trust Co.* v. *United States*, 246 F.2d 410, 417 (7th Cir. 1957), *cert. denied*, 355 U.S. 881 (1957); *Lewyt Corporation* v. *Health-Mor, Inc.*, 181 F.2d 855, 857 (7th Cir. 1950), *cert. denied*, 340 U.S. 823 (1950). See also *Nelson* v. *Montgomery Ward Co.*, 312 U.S. 373, 376 (1941), *Lummus Co.* v. *Commonwealth Oil Ref. Co.*, 297 F.2d 80, 90 (2d Cir. 1961), *cert. denied* 368 U.S. 986 (1962).

## IV.

## THERE IS NO CONFLICT BETWEEN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND OTHER CIRCUITS AS TO PROPER STANDARDS GOVERNING FEE AWARDS

Petitioners in their request for a writ concede that despite overall uniformity with respect to fee standards, subsidiary rules may be dependent on the "nature and reason for the granting of attorneys' fees" (Pet. 8). It is precisely such variations in factual context rather than any fundamental conflict as to applicable law that caused the Seventh Circuit to conclude that any element of benefit conferred here did not support the fees thought appropriate by petitioners. Rather, the opinion makes clear that modification of the judgment below was deemed necessary not because of rejection of prevailing legal criteria but because of a conviction that "under the particular circumstances of this case," . . . "a relatively large percentage award is not appropriate" (Op. 4a). This conclusion was based upon the record facts showing that any benefits accruing were

not clearly attributable to the direct effort and skill of the attorneys involved.

Petitioners cite *Angoff* v. *Goldfine*, 270 F.2d 185, 189 (1st Cir., 1959) as listing the proper factors to be considered in fixing compensation and conclude that "The Seventh Circuit in this case reduced these complexities to the single, simplistic standard of a proper hourly rate of compensation . . ." (Pet. 9). However, the Seventh Circuit adhered to the same standards articulated in *Angoff*, and in fact cited that decision with approval in support of the following statement:

> "It has been generally held that an appropriate award of attorneys' fees should be determined on the basis of several elements, including the skill and reputation of counsel, the time expended by attorneys in preparing the case, the novelty and difficulty of the legal issues presented, and the benefits conferred upon the class. *Angoff* v. *Goldfine*, 270 F.2d 185 (1st Cir. 1959); [other citations omitted]" (Op. 3a).

Indeed, the opinion of the Court below dwells more on the single consideration of benefits conferred than on any other factor. Patently, it was not disregard of this factor, but a positive determination thereunder that petitioners' contribution bore no significant causative relationship to any benefits attained that influenced the Court to reduce the initial award. Such a finding discloses no inconsistency among the Circuits as to principle, but only suggests a quite properly particularized application of the agreed legal standards to the facts at bar.

This principle is perhaps even more strikingly exhibited by a more recent case from the First Circuit, which the petitioners have chosen as a model of the alleged conflict as to standards. In *Green* v. *Transitron Electronic Corp.* 326 F.2d 492 (1st Cir. 1964) (Pet. 8), the First Circuit had

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occasion to express its disapproval of awards based on standard percentage formulas, thus amply demonstrating the hazard of construing *Angoff* (or any other decision) as authority for the application of inflexible formulas.

In the Court below Judge Wyzanski had expressed the same concern reflected by the Seventh Circuit in *Milwaukee Towne Corp.* and *Harris* as to awards of attorneys' fees, flatly rejecting the petitioners' request that the attorneys' time be relegated to a position of secondary importance. Judge Wyzanski noted that:

> ". . . unless time spent and skill displayed be used as a constant check on applications for fees, there is a grave danger that the bar and bench will be brought into disrepute . . . .
>
> "Admittedly commercial considerations will always play some part in the practice of the law. But the nature of our calling as an 'ancient and honorable profession' precludes judicial awards of counsel fees so high as to excite the warranted indignation of those whose money is used,—or the understandable criticism of those who successfully perform equally complicated and publicly useful tasks at the bar,—or the justified outrage of the public if a court should use other people's money to make an award equal to what ordinarily is earned only over many years as compensation for services that took a short time to perform." *Cherner* v. *Transitron Electronic Corp.*, 221 F. Supp. 55, 61-62 (D. Mass. 1963)

In affirming Judge Wyzanski's opinion *sub nom., Green* v. *Transitron Electronic Corp., supra,* the First Circuit observed that:

> ". . . the fact that the actions were terminated prior to extensive litigation is deserving of much practical consideration. The settlement . . . avoided for the plaintiffs the heaviest part of their burden: further discovery,

preparation for trial, appearances in court, and the possibility of ultimate failure with the result of no compensation whatever." 326 F. 2d at 497.

Here, of course, there has been no discovery, only a few brief hearings in the trial court, and a quick settlement fortuitously reached because of considerations far removed from the skill or ability of plaintiffs' counsel. The Seventh Circuit could do nothing other than materially reduce an award of $1,000 per hour resulting from the trial court's "exorbitant allowance" or the result would have been to "bring both the bar and the bench into public disrepute." *Milwaukee Towne Corp.* v. *Loew's Inc.*, 190 F. 2d at 570.*

## V.

## ANY BENEFITS ACCRUING TO THE CLASS ARE NOT FAIRLY ATTRIBUTABLE TO THE EFFORTS OF PLAINTIFFS' COUNSEL

Notwithstanding plaintiffs' counsel's insistence that the Seventh Circuit failed to give suffcient emphasis to such benefits as were allegedly conferred upon the class, the appellate opinion conclusively demonstrates that the criterion was fully discussed and thoughtfully applied as one of the several pertinent standards upon which the various Courts of Appeal are in general agreement. The Seventh Circuit carefully noted in giving weight to this factor, however, that ordinarily "the benefits conferred upon the class

* Neither the Seventh Circuit nor Flying Tiger has any quarrel with the results reached in the cases cited by plaintiffs' counsel where supposedly large "contingent" or percentage awards were made. In none of them does the hourly rate remotely approach that of plaintiffs' counsel here and in all a substantial time in discovery, trial, appeal, etc., was involved or else the fee had been agreed to and was not in dispute.

are achieved through the direct effort and skill of the attorneys involved" yet "it is far from clear that this was so in the instant case." (Op. 4a) A review of the record and circumstances of settlement fully support the Court's determination.

As set forth in the Counter Statement, *supra,* this litigation was settled at a conference in New York on a Sunday because plaintiffs' counsel had created a disastrous situation, harmful to their own clients and to the class they sought to represent, whereby trading had been halted on the national exchanges in all Flying Tiger securities. Obviously, this presented an untenable situation for any holder of Flying Tiger securities *including* the members of the class represented by plaintiffs' counsel. The class' investment, worth more than $65 million, was frozen by the action of its own counsel. They could neither buy nor sell. If trading were not restored, stockholders would face the prospect of calls for additional or substitute collateral on bank or broker loans secured by Flying Tiger securities and the orderly liquidation of estates holding Flying Tiger securities would have been dangerously disrupted. These are but a few of the serious consequences that flow from any elimination of an auction market in a security that is a freely transferable asset (App. 172, 185-186).*

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* Plaintiffs' counsel, as fiduciaries charged with the protection of the members of the class, and as self described "established specialists in securities and stockholder matters and related litigation" (App. 218) had an obligation, before seeking an injunction against the stock dividend to determine the possible consequences and advise the Court accordingly. This they did not do. On the contrary, petitioners challenged counsel for Flying Tiger in argument before the court to explain the disastrous consequences that would flow from the issuance of an injunction. ". . . [N]o harm will occur to Flying Tiger or its shareholders by delaying it. I would like to hear how it is going to harm them." (App. 169).

A settlement was reached on that Sunday in March because of the compulsion on both plaintiffs and Flying Tiger to restore trading in Flying Tiger securities and bring order out of the injunction caused confusion. Thus, as stated in the settlement agreement and noted in the opinion of the Court of Appeals:

> ". . . plaintiffs through their attorneys obtained an agreement in principle to settle this matter on reasonable terms and *were acutely concerned about the suspension of trading privileges* of the Flying Tiger securities on the New York Stock Exchange and the American Stock Exchange and the possible adverse effects of this suspension on the value of these securities . . ." (Op. 6a-7a)

Likewise as noted in the opinion (Op. 5a) and as set forth in the settlement agreement, there was an additional incentive to Flying Tiger to make this special settlement which had nothing to do with the litigation but rather involved a proposed new regulation of the Internal Revenue Service. This regulation, published after the declaration of the 5% stock dividend by Flying Tiger, could have made the dividend taxable as ordinary income to all Flying Tiger common stockholders contrary to previous practice and the belief of Flying Tiger's counsel. Assuming a 35% marginal tax bracket for such stockholders, a tax of approximately $3.2 million would have been levied on these stockholders requiring payment in cash despite the fact that no cash consideration of any kind would be received. Obviously, Flying Tiger had to respond to this unforeseen tax development in a way that would be in the best interests of its stockholders. The injunction obtained by plaintiffs' counsel came only a few days after the announcement of the new tax regulation and while Flying Tiger was still considering its impact. It occurred to Flying Tiger that a change in the dilution provisions of the securities issued to former North

American shareholders in the merger would not only provide a means of using corporate securities to avoid the rigorous cash impact of the proposed regulation on its common stockholders, but might also be welcomed by plaintiffs' counsel as a graceful means of extricating themselves from the disastrous consequences of the injunction they obtained without consideration of its consequences. In both the stipulation of settlement and in the proxy materials accompanying the settlement, Flying Tiger has stated that the changes in the nature of the securities were designed "primarily to avoid" the adverse impact of the new tax regulations (App. 190).

After the Sunday settlement, the disastrous injunction was lifted and trading in Flying Tiger securities resumed on Monday, March 29, 1971 (App. 331).

Plaintiffs' counsel obtained the injunction for a brief period of time until it was dissolved by agreement. It benefited no one. It injured everyone. It created no fund from which a fee could be extracted. In fact, it put in jeopardy the substantial profits already realized by the plaintiffs themselves, as a result of the merger.* Plaintiffs' counsel succeeded only in creating an untenable situation for their own clients' investments and those of the Flying Tiger common stockholders. No novel legal theory was involved. In fact, none of the specific relief requested in the complaint was embodied in the provisions of the final settlement agreement. No trial or discovery took place. No massive legal effort was required nor expended.

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* In December, 1970 when petitioners sought to enjoin the merger between Flying Tiger and North American, North American common stock was trading at approximately $21-22 per share. Since the effective date of the merger (January 7, 1971) the value of the Flying Tiger package received by North American stockholders for each share of North American common stock had risen to $39¼ as of March 22 (the day the injunction against the stock dividend was granted) (App. 254).

In reliance on these record facts and the decided cases, the Court of Appeals reduced the initial fee award to $75,000 concluding that amount to be appropriate and adequate. There is no need for review by this Court.

## CONCLUSION

The petition should be denied.

Respectfully submitted,

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MICHAEL RODAK, JR., C

No. 72-1121

In the
# Supreme Court of the United States
October Term, 1972

JOHN H. ELLIS, *et al.*,
*Petitioners,*

*vs.*

FLYING TIGER CORPORATION,
*Respondent.*

## PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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OCTOBER TERM, 1972

## *No. 72-1121*

JOHN H. ELLIS, *et al.*,
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## PETITIONERS' REPLY TO BRIEF IN OPPOSITION

1. The questions raised by petitioners concern not the propriety of the District Court judgment but the impropriety of the decision of the Court of Appeals. Nevertheless, the respondent rests on findings of fact—unsupported by record evidence—made by the Court of Appeals and contradicting those made by the trial court. Clearly, then, the decision below was in conflict with the judgments of other circuits on the question where the fact-finding function properly belongs.

2. Given the respondent's premise, that the Court of Appeals could properly substitute its own findings for those of the trial court and, therefore, that the petitioners made no contribution to the restoration of rights to the preferred stockholders, the Court of Appeals would have no basis for awarding a fee of $75,000, which it did. The

award of that fee makes it clear that there was a "substantial" contribution made by petitioners but that the appellate court resorted to a different measure of compensation—an hourly rate rather than a portion of the benefit conferred. Again, then, the decision of the Court of Appeals is in conflict with those of other circuits.

3. Respondent, by its *ipse dixit*, would remove its actions from those calling for "corporate therapeutics." The fact is that Flying Tiger manipulated the payment of dividends to dilute the newly acquired interests of its preferred stockholders, to the tune of some $4,000,000. If this does not call for "corporate therapeutics," it is hard to know what does. The respondent's indignation is typical of a defendant in a case calling for imposition of counsel fees; it is not a reason for not doing so.

4. There is no reluctance on the part of petitioners to assert their economic interests in the outcome of this case. Their petition is based on the proposition that the function of the award of fees is to provide adequate incentive to counsel to undertake representation in cases of this sort. The strained suggestion (in the starred footnote on page one of the Brief in Opposition) that petitioners misused the "original title," is typical of respondent's flimsy allegations. The "original title" was the one imposed by the respondent in the Court of Appeals after "[a]ll other parties were dismissed pursuant to the settlement agreement which ended the action except as to a 'reasonable fee' for plaintiffs' counsel."

5. The cases cited by respondent in support of its position emphasize rather than dilute petitioner's allegations that there is a conflict in the circuits as to: 1) the proper standards to be applied in the fixing of counsel fees; 2) the authority of the Court of Appeals to

substitute itself for the trial court in the finding of facts; 3) the proper procedure to be utilized where the Court of Appeals rejects findings of fact made by the trial court.

6. Despite respondent's elaborated and extended contentions against the substantially contingent nature of petitioners' fee arrangements, it remains that the district court considered the facts and found the arrangements to be substantially contingent. The Court of Appeals (while it made its own contrary findings in other areas) did not indicate it was disturbing this finding or disagreeing with it. And its own award was more than the restrictive dollar limit of the agreement of petitioners with their clients.

Petitioners respectfully suggest that a writ of certiorari should issue to the Court of Appeals for the Seventh Circuit in this case so that the conflicts among the circuits can be resolved and proper standards might be established for fixing counsel fees for actions such as this one. For, as respondent points out: "*Mills* itself makes no reference to the quantum of fees to be awarded but is concerned solely with *whether* such an award is appropriate". Brief in Opposition, p. 10, n*. (Emphasis in Original.)

Respectfully submitted,

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